THE INJURIES COVERED

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In the Workmen's Compensation Act the legislature has defined the word "injury" as follows: " 'Injury' includes any injury received in the course of, and arising out of, the injured employee's employment."[1]

It is clear from the above statutory definition that to maintain a workmen's compensation claim for an injury three conditions must be met:

(a) There must be an injury;
(b) The injury must be received in the course of the injured employee's employment; and
(c) The injury must arise out of his employment.

Failure of the facts to satisfy all three statutory requirements takes the claim outside the legislative definition of an "injury" and consequently outside the coverage of the Workmen's Compensation Act.

The case law on what injuries are covered by the act has developed entirely around the above three statutory requirements. The limits of this article do not permit an analysis of all the Ohio Supreme Court cases which have considered the meaning and construction of the term "injury." In general, only those decisions since the 1937 amendment of the statutory definition of injury will be considered.[2]

CONSTRUCTION OF "INJURY"

To a physician an "injury" means any bodily harm and to him an "accidental injury" means any sudden and unexpected bodily harm, such as a cerebral vascular accident. One of the purposes of this article is to determine whether the term "injury" as used in the Workmen's Compensation Act has the same broad meaning.

Judicially, the meaning of the word "injury" as used in the act has varied little over the years, but considerable confusion has been caused in the application of the judicial interpretation of this word to the facts presented in various cases. The first definition of this word by the Ohio Supreme Court is found in *State ex rel. Yaple v. Creamer*,[3] decided in 1912, where the court said:

> It [the Workmen's Compensation Act] provides a plan of compensation for injuries, wilfully not self inflicted, resulting

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[1] OHIO REV. CODE § 4123.01(C) (1953).

[2] The 1937 amendment is considered pp. 567-71 *infra*.

[3] 85 Ohio St. 349, 97 N.E. 602 (1912).

> from *accidents* to employes of employers. . . .[4] (Emphasis added.)

One of the important decisions after the 1937 amendment was *Reynolds v. Industrial Comm'n*,[5] where the plaintiff in doing his work was required over a period of about three months to use a heavy pneumatic air hammer while occupying a cramped position. He testified that while so working: "I broke down . . . something took hold of me. I thought it was rheumatism."[6] The Ohio Supreme Court after referring to the definition of injury as contained in *Malone v. Industrial Comm'n*,[7] stated in its opinion: "It will be readily seen that nothing occurred to the appellee within the purview of such statement which would constitute an accidental injury."[8]

In *Gerich v. Republic Steel Corp.*,[9] the decedent was engaged, along with others, in pushing a cart filled with tools up a slightly inclined railroad track. He suddenly collapsed while so working. The supreme court, noting that there was no evidence that any accidental or unusual incident had occurred, held that the death was not compensable.[10]

In *Nelson v. Industrial Comm'n*,[11] the plaintiff's decedent suffered a cerebral hemorrhage while working in a crouched position. The supreme court held that decedent had not sustained an accidental injury with respect to his crouched position. The court mentioned that this was the position most convenient and further commented:

> In every muscular movement there is stress and strain, but, unless there is something unusual or out of the ordinary in the manner of doing his work, which a person is either forced to undergo or undergoes voluntarily, his death is not compensable when he dies from a condition which has long been with him. It is common knowledge that, where physical conditions prevail, as in the case of decedent, death from cerebral hemorrhage occurs to people at work, in their offices, on the street, at home or in bed.[12]

The most recent supreme court definition of the word "injury"

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[4] *Id.* at 386, 97 N.E. at 603.

[5] 145 Ohio St. 389, 61 N.E.2d 784 (1945).

[6] *Id.* at 390, 61 N.E.2d at 784.

[7] 140 Ohio St. 292, 43 N.E.2d 266 (1942). See discussion pp. 569-70 *infra*.

[8] 145 Ohio St. 389, 391, 61 N.E.2d 784 (1945).

[9] 153 Ohio St. 463, 92 N.E.2d 393 (1950).

[10] The court stated in its opinion: "Evidence which shows simply that an injury either may have been a result of an accidental impact arising out of and in the course of employment or may have been suffered in the course of employment in the regular course of nature in the usual and normal activities of the employment is not evidence to support a compensation claim." *Id.* at 468, 92 N.E.2d at 396.

[11] 150 Ohio St. 1, 80 N.E.2d 430 (1948).

[12] *Id.* at 9, 80 N.E.2d at 434-35.

appears in the first paragraph of the syllabus in *Dripps v. Industrial Comm'n*,[13] where compensable injury is defined as follows:

> The term, "injury", as used in the Ohio Workmen's Compensation Act, comprehends a physical or traumatic damage or harm accidental in character and as a result of external and accidental means in the sense of being the result of a sudden mishap, occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place.

All that the *Dripps* case has added is a clearer explanation of the requirement that the injury be accidental. This case firmly establishes the principle that in order for an injury to be compensable it must be the result of an accidental *cause* or *means* and it is not sufficient that the *result* be unexpected or accidental. Because the equipment on which Mr. Dripps was working had become unbalanced and twisted, he had been required for some nine weeks to exert a greater pull on a line. While so pulling, he suddenly and unexpectedly sustained "a strain in the left arm which has been determined to be a traumatic disturbance of the brachial plexis."[14] The result was accidental. That this is not sufficient to constitute a compensable injury is made clear by the language of the second paragraph of the syllabus which reads:

> The fact that a workman is injured by exerting more effort or being subjected to a greater strain than is customary in the performance of his work is not in and of itself sufficient to entitle such workman to participate in the State Insurance Fund; and before such participation may be had it must appear that such increased effort or strain was occasioned by some sudden mishap or unusual event.

In defining or construing the word "injury" as used in the act attention should also be given to the case of *Artis v. Goodyear Tire & Rubber Co.*[15] Here the plaintiff, because of a shortage of help, was forced to stack liners on skids to a height of seven feet whereas he normally stacked them to a height of five feet. While doing this work he developed a sudden pain in the back and maintained that having to reach seven feet rather than five and having to work harder because of a shortage of help, he was subjected to an unusual condition and that his injury therefore was a compensable one. The supreme court held otherwise. In its opinion it cited and approved *Matczak v. Goodyear Tire & Rubber Co.*,[16] where it had held that a compensable injury had not been

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[13] 165 Ohio St. 407, 135 N.E.2d 873 (1956).

[14] *Id.* at 409, 135 N.E.2d at 875.

[15] 165 Ohio St. 412, 135 N.E.2d 877 (1956).

[16] 139 Ohio St. 181, 38 N.E.2d 1021 (1942). For a discussion of this case and

sustained though plaintiff while lifting a bag of material felt a snap or catch in his back and was subsequently disabled because of back disability.

Support for the position that "injury" means accidental injury can be found in the Workmen's Compensation Act itself. For example, Ohio Revised Code section 4123.28 (1953) provides in part:

> Every employer in this state shall keep a record *of all injuries*, fatal or otherwise, received by his employees in the course of their employment and resulting in seven days or more of total disability. Within a week after the occurrence of an *accident* resulting in *such personal injury*, a report thereof shall be made in writing to the industrial commission. . . . (Emphasis added.)

In other sections of the act the legislature has used the terms "injury" and "accident" synonymously.[17] Recognition of this can be found in the cases.[18]

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others, most of which were decided prior to the 1937 amendment, see Hadley, *When Is An Injury Not An Injury*, 25 Ohio Op. 487 (1943).

[17] OHIO REV. CODE § 4123.22 (1953) (The Commission's annual report shall contain a statement of the "causes of accidents leading to the injuries."); OHIO REV. CODE § 4123.34(C) (1953) (In determining premium rates the basis shall be "individual industrial accident experience."); OHIO REV. CODE § 4123.17 (1953) (The Commission can spend money for the investigation and prevention of industrial accidents.); OHIO REV. CODE § 4123.66 (Baldwin Supp. 1958) ("In case an industrial accident causes damage to artificial teeth" or "in case an industrial accident which injures an employee also causes damage to the employee's eyeglasses" the Commission shall pay for the repair or replacement of such denture or eyeglasses.); OHIO REV. CODE § 4123.519 (Baldwin Supp. 1958) (A decision of the Industrial Commission in any injury case, other than a decision as to extent of disability may be appealed "to the court of common pleas of the county in which the injury was inflicted.").

[18] In the Dripps case, *supra* note 13, Judge Taft said in his concurring opinion:

"It has been suggested that there is no statutory or constitutional basis for a conclusion that, in order to be an 'injury' within the meaning of Workmen's Compensation Act, 'a physical or traumatic damage or harm' must be 'accidental in its character in the sense of being the *result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place*' (or, in other words, the result of accidental means), instead of being merely 'accidental in character and result.' See Johnson v. Industrial Commission, 164 Ohio St. 297, 306, 130 N.E.2d 807; Renkel v. Industrial Commission, 109 Ohio St. 152, 156, 141 N.E. 834. However, there is statutory language which tends to support the pronouncement of law being made in paragraph one of the syllabus of the instant case. See for example Section 4123.28 ('accident resulting in . . . injury') and 4123.22 ('accidents *leading to* injuries for which awards . . . made') Revised Code."

However, in an earlier decision in Johnson v. Industrial Comm'n, *supra*, the court said: ". . . This court has often held that, in order to be an 'injury' within the meaning of the Workmen's Compensation Act, 'a physical or traumatic damage or harm' must be 'accidental in its character in the sense of being the result of a

A disease cannot constitute an accidental injury. The importance of this obvious statement can be appreciated when it is realized that only injury cases can be appealed to court.[19]

In *Johnson v. Industrial Comm'n*,[20] the decedent while working was exposed to cold, rainy weather on a particular day. He died of pneumonia three weeks later. Two physicians testified that there was a causal relationship between the hazards of decedent's employment on the day in question and his subsequent pneumonia and death. The court held that while decedent had contracted a disease which caused his death a disease could not be an injury as that term is used in the Workmen's Compensation Act.[21]

A death occurring on the employer's premises during working hours is not necessarily compensable.[22] An acute dilation of the heart,[23] a coronary occlusion,[24] a cerebral hemorrhage[25] or a coronary thrombosis,[26] although occurring during the hours of employment, do not necessarily constitute compensable injuries.

Quaere: What if the disability is caused by an accident but there is no trauma to the injured man and the entire disability is due to an emotional reaction? For example, suppose that X, while at work, witnesses a horrible and bloody accident which kills Y, a fellow worker. X goes into shock and has an immediate and damaging impairment of his mental faculties. If common law tort principles were applied, the occurrence would not be sufficient to constitute an injury.[27] Similarly, under the Workmen's Compensation Act, X's injury is probably not compensable. In an analogous situation in the case of *Toth v. Standard Oil Co.*,[28] where an employee was subjected to police investigation on

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sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place.' Malone v. Industrial Commission, *supra* (140 Ohio St. 292), paragraph one of syllabus; Toth v. Standard Oil Co., *supra* (160 Ohio St. 1), paragraph one of syllabus. But see Maynard v. B. F. Goodrich Co., *supra* (144 Ohio St. 22). It may be observed that our Constitution and Statutes apparently do not contain any such 'accidental' requirement. . . ."

[19] OHIO REV. CODE § 4123.519 (Baldwin Supp. 1958).

[20] See note 18, *supra*.

[21] See also Industrial Comm'n v. Armacost, 129 Ohio St. 176, 194 N.E. 23 (1935) (chemical conjunctivitis); Industrial Comm'n v. Russell, 111 Ohio St. 692, 146 N.E. 305 (1924) (optic atrophy); Renkel v. Industrial Comm'n, 109 Ohio St. 152, 141 N.E. 834 (1923) (tuberculosis); Industrial Comm'n v. Cross, 104 Ohio St. 561, 136 N.E. 283 (1922) (typhoid fever); Industrial Comm'n v. Brown, 92 Ohio St. 309, 110 N.E. 744 (1915) (lead poisoning). *But cf.*, Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N.E. 870 (1934) (infection from vaccination).

[22] Stanfield v. Industrial Comm'n, 146 Ohio St. 583, 67 N.E.2d 446 (1946).

[23] Goodman v. Industrial Comm'n, 135 Ohio St. 81, 19 N.E.2d 508 (1939).

[24] Vogt v. Industrial Comm'n, 138 Ohio St. 233, 34 N.E.2d 197 (1941).

[25] Cordray v. Industrial Comm'n, 139 Ohio St. 173, 38 N.E.2d 1017 (1942).

[26] McNees v. Cincinnati St. Ry., 152 Ohio St. 269, 89 N.E.2d 138 (1949).

[27] Davis v. Cleveland Ry., 135 Ohio St. 401, 21 N.E.2d 169 (1939); Miller v. Baltimore & Ohio S.W.R.R., 78 Ohio St. 309, 85 N.E. 499 (1907).

[28] 160 Ohio St. 1, 113 N.E.2d 81 (1935).

suspicion that a truck driven by the employee had injured a pedestrian and where the employee thereafter suffered partial paralysis from a cerebral hemorrhage claimed to have been caused by anxiety and worry brought on by the investigation, the Ohio Supreme Court concluded that he had not suffered a compensable injury under the Workmen's Compensation Act. The court held that it is necessary that the injury be physical or that there be traumatic damage, accidental in character[29] and that worry and anxiety alone do not constitute an injury.[30]

From the foregoing cases, it is readily apparent that the meaning of the word "injury" under the act is considerably more restricted than is the meaning of this word to a physician.

CONSTRUCTION OF "ARISING OUT OF" AND OF "IN THE COURSE OF"

The workmen's compensation laws of some states only require that an injury suffered by an employee arise out of *or* occur in the course his employment. Most states require a showing of both. In any event the word "and" is used in the Ohio act[31] and its consequences cannot be overlooked. Often the language of the decisions refers to course of employment when a student of the act might feel that the court meant arising out of the employment. Nevertheless, it is clear that if both "course of" and "arising out of" cannot be shown, the injury is not compensable.

Logically, this problem should be approached from the standpoint of an accidental injury sustained in the course of, but not arising out of, the employment and accidental injuries arising out of, but not sustained in the course of the employment. Such a cataloguing of cases would be time-consuming and not particularly rewarding for often when one or the other requirement is not met the court makes the blanket statement the accidental injury is not compensable because it did not arise out of *and* was not sustained in the course of the employment. Other times when it might be urged that the injury arose out of but was not sustained in the course of employment, the court expresses the opinion that the employee's injury did not arise out of the employment or that the employee left his course of employment.

Even though an employee is injured while working and while clearly in the course of his employment, the injury does not necessarily arise out of his employment. This is often the situation in "horseplay" and fight cases. On the other hand a foreman who while relaxing on a public beach is hit on the head by a pop bottle thrown by a disgruntled employee may have been injured by an event which arose out of the

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[29] *Id.* at 5, 113 N.E.2d at 83.

[30] *Id.* at 6-7, 113 N.E.2d at 84. See also McNees v. Cincinnati St. Ry., *supra* note 26; Shea v. Youngstown Sheet & Tube Co., 139 Ohio St. 407, 40 N.E.2d 669 (1942). *But see* Ray v. Industrial Comm'n, 65 Ohio L. Abs. 5 (1951).

[31] OHIO REV. CODE § 4123.01(C) (1953).

employment but the injury clearly did not occur in the course of his employment.

The most dramatic presentation of the necessity of meeting both the requirements is found in *Georgejakakis v. Wheeling Steel Co.*[32] Plaintiff was hired for limited duties as a laborer. Without necessity, authority, or apparent reason he attempted to operate a pressing machine and accidentally lost by amputation the fingers of his left hand. In denying compensation the court said that plaintiff "was injured outside the sphere of his employment; not through an act which he improperly and unauthorizedly did within such sphere."[33]

In general, we will now consider the requirements of "arising out of" and "in the course of employment" as they are affected by the various factors such as the place of the accident, the time of the accident, and the cause of the accident. The cases relating to these requirements cannot be categorically catalogued for all factors may be pertinent in the same case.

Normally an employee whose duties have a fixed situs and who is injured while on the public highway or public sidewalk outside his employer's premises and while on his way to or from work, is not covered by the act.[34] Although it might be said that in a sense his injury arose out of his employment, he is not in the course of his employment. There are exceptions however, even to this rule.[35] When the injury occurs within close proximity to the employer's premises, especially when he is using the normal means of ingress to or egress from the plant, his injury will be compensable if he is found to have entered the zone of his employment.[36]

In *Fike v. Goodyear Tire & Rubber Co.*[37] plaintiff was walking on a public sidewalk alongside of defendant's plant intending to enter a gate to go to work when he was struck by a vehicle owned by defendant which was coming out of the plant on its way to the public highway. Plaintiff sued at common law and on appeal the defendant maintained that the

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[32] 151 Ohio St. 458, 86 N.E.2d 594 (1949).

[33] *Id.* at 461, 86 N.E.2d at 595. However, the court stated that a slight or inconsequential departure will not have the same result. *Id.* at 460, 86 N.E.2d at 595.

[34] Stevens v. Industrial Comm'n, 145 Ohio St. 198, 61 N.E.2d 198 (1945); Industrial Comm'n v. Gintert, 128 Ohio St. 129, 190 N.E. 400 (1934); Industrial Comm'n v. Baker, 127 Ohio St. 345, 188 N.E. 560 (1933); Industrial Comm'n v. Heil, 123 Ohio St. 604, 176 N.E. 458 (1931); Conrad v. Youghiogheny & Ohio Coal Co., 107 Ohio St. 387, 140 N.E. 482 (1923); Fike v. Goodyear Tire & Rubber Co., 56 Ohio App. 197, 10 N.E.2d 242 (1937).

[35] Smith v. Industrial Comm'n, 90 Ohio App. 481, 107 N.E.2d 220 (1948). An employee on 24 hour call while returning home from an off duty call to the plant is killed by an automobile while crossing a roadway which separates the plant and his home; held, such death and injury occurred in the course of and arose out of the employment.

[36] Industrial Comm'n v. Beuber, 117 Ohio St. 373, 159 N.E. 363 (1927).

[37] 56 Ohio App. 197, 10 N.E.2d 242 (1937).

judgment for plaintiff should be reversed because plaintiff was at the time of the injury within the zone of his employment and hence limited to his rights under the workmen's compensation law.[38] Judgment for plaintiff was affirmed.

An accident occurring in a parking lot before the employee actually starts working or after he finishes work is normally compensable[39] although it will not be compensable if the injury is due to hazards common to the general public.[40]

Even though the injury occurs at work, the circumstances as to cause may render it non-compensable. Food poisoning injuries caused by a meal eaten on the employer's premises are not compensable.[41] An assault by an employee on a co-employee is not covered by the act.[42] But the rule is to the contrary if the assaulted employee was carrying out a duty of his employment at the time of the assault and the assault was brought about by the performance of such duties.[43]

The most recent decision dealing with assaults by a fellow employee is that of the Franklin County Court of Appeals in *Davis v. Industrial Comm'n.*[44] The plaintiff's decedent Collins engaged in an argument with a fellow employee Washburn over the ability of each as a beer salesman while Collins (in a room furnished by the employer) was filling out his report of his day's work. Uncomplimentary names were exchanged and a fight ensued resulting in injuries to Collins which later proved fatal. In other words, the argument led to an altercation which resulted in plaintiff's decedent's death. In its opinion the court said: "This work was voluntarily abandoned when he became engaged in the fight which it appears was a private affair."[45] The same rule applies in cases of horseplay.[46]

Where in the absence of an accidental cause an employee collapses and falls at work thereupon injuring himself because of the fall, his resulting injury does not arise out of his employment if it is caused by

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[38] For other zone of employment cases see 42 OHIO JUR. *Workmen's Compensation* §§ 52, 53 (1936).

[39] Pickett v. Industrial Comm'n, 98 Ohio App. 372, 129 N.E.2d 639 (1954) (employer neither owned nor controlled parking lot); Krovosucky v. Industrial Comm'n, 74 Ohio App. 86, 57 N.E.2d 607 (1943).

[40] Walborn v. General Fireproofing Co., 147 Ohio St. 507, 72 N.E.2d 84 (1947).

[41] Coston v. Carnegie-Illinois Steel Corp., 69 Ohio L. Abs. 375, 125 N.E.2d 736 (1952). *But see* Sebek v. Cleveland Graphite Bronze Co., 148 Ohio St. 693, 76 N.E.2d 892 (1947).

[42] Brown v. Industrial Comm'n, 54 Ohio L. Abs. 333, 82 N.E.2d 878 (1948).

[43] Industrial Comm'n v. Pora, 100 Ohio St. 218, 125 N.E. 662 (1919).

[44] 76 Ohio L. Abs. 474, 148 N.E.2d 100 (1957).

[45] *Id.* at 476, 148 N.E.2d at 101.

[46] Industrial Comm'n v. Bankes, 127 Ohio St. 517, 189 N.E. 437 (1934).

hitting the floor.[47] But if the resulting injury is because of hitting machinery or equipment, it is compensable.[48]

Injuries caused by an act of God are generally recognized as being non-compensable.[49]

Injuries sustained while the employee is away from the employer's physical place of business such as injuries to traveling salesmen and employees attending conventions may or may not be compensable, depending upon what the employee was doing at the time of the injury, where the injury occurred, and other such factors.

In *Bower v. Industrial Comm'n*,[50] a school teacher attending an institute in a city foreign to her place of teaching was held entitled to compensation, where she received an injury as a result of an automobile accident which occurred while she was on the way from the institute meeting place to her place of lodging for the night. She intended to return to and attend the institute the following day.

In *Scott v. Industrial Comm'n*,[51] however, the plaintiff was held not entitled to compensation for injuries due to slipping on a rail of the streetcar track on a city street where the accident occurred as plaintiff was returning to his work after lunch. Here plaintiff was engaged in work in a city away from his employer's principal place of business but the court held that he was not exposed to a hazard greater than that to which the general public was exposed.

In *Eagle v. Industrial Comm'n*,[52] plaintiff had made a call in Bond Hill and was on her way back to Pogues to take care of accumulated business. She paused en route to take her lunch in order to save time. The court held that when she entered a restaurant of her own choice (her employer having no control over the premises) for the purpose of getting her lunch, she was not in the course of her employment. This rule was also applied in *Ruddy v. Industrial Comm'n*,[53] where a salesman who interrupted his automobile trip to a customer's home by stopping at a cafe and received an injury on the way from the cafe to his car which he was entering for the purpose of continuing the business trip was held not to be entitled to compensation. The court said that he was not in the course of his employment at the time and that the injuries did not arise out of his employment.

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[47] Eggers v. Industrial Comm'n, 157 Ohio St. 70, 104 N.E.2d 681 (1952); Stanfield v. Industrial Comm'n, 146 Ohio St. 583, 67 N.E.2d 446 (1946).

[48] Industrial Comm'n v. Nelson, 127 Ohio St. 41, 186 N.E. 735 (1933).

[49] Slanina v. Industrial Comm'n, 117 Ohio St. 329, 158 N.E. 829 (1927). However, the rule is contrary where the employee's duties expose him to some special danger not common to the public at large. See Industrial Comm'n v. Carden, 129 Ohio St. 344, 195 N.E. 551 (1935); Industrial Comm'n v. Hampton, 123 Ohio St. 500, 176 N.E. 74 (1931).

[50] 61 Ohio App. 469, 22 N.E.2d 840 (1939).

[51] 62 Ohio L. Abs. 11, 105 N.E.2d 881 (1951).

[52] 146 Ohio St. 1, 63 N.E.2d 439 (1945).

[53] 153 Ohio St. 475, 92 N.E.2d 673 (1950).

Clearly the courts in Ohio have not gone as far as have the California courts. There the supreme court held in *Wiseman v. Industrial Acc. Com.*[54] that the widow of a banker who died of asphyxiation in a hotel room was entitled to benefits. The defendant maintained that because the decedent was occupying the room with one other than his wife (although registered as his wife) for an immoral purpose and because the fire originated because of the decedent's carelessness (in smoking) that the injury did not arise out of the decedent's employment and that the decedent was not in the course of his employment immediately before and at the time of death. In holding the claim compensable the court, although recognizing that the decedent was occupying the room for an unlawful and criminal purpose, ruled that this would not defeat the claim saying:

> [W]here the employee is combining his own business with that of his employer or attending to both at substantially the same time, no nice [sic] inquiry will be made as to which business he was actually engaged in at the time of injury. . . .[55]

There is nothing in the decision to indicate that the rule is confined to bankers.

Injuries caused by participating in sport activities outside working hours when the activity is sponsored or actively supported and encouraged by the employer are injuries arising out of and received during the course of employment and are compensable. In *Ott v. Industrial Comm'n*[56] the employee died as a result of an acute cardiac dilation while playing baseball on a team sponsored by his employer. His death was held to be compensable. The degree of employer support or sponsorship of the extra-curricular activity may be most material in determining whether the injury is compensable.[57]

Alternative or Additional Remedies

Except where the employer was required by law to comply with the

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[54] 46 Cal. 2d 570, 297 P.2d 649 (1956).

[55] *Id.* at 573, 297 P.2d at 651.

[56] 83 Ohio App. 13, 82 N.E.2d 137 (1948).

[57] Bureau of Workmen's Compensation, *Important Resolutions, Rules, Orders and Instructions* 7 (Rev. April 1, 1956), reads:

"It is hereby directed that in all cases where the employer encourages the employees to engage in athletics, either during working hours or outside of working hours, and supervises and directs, either directly or indirectly, such activities, meritorious claims for injuries to any such employees while so engaged will be recognized, the employer's risk and experience to be charged with such cases. In the event any such employees, while so engaged, receive extra compensation from the employer, the same shall be included in the payroll reports of this department.

This order shall not apply to employers who do not supervise and direct either directly or indirectly athletic activities of their employees or do not pay the employees for the time devoted to athletics."

act but failed to take out workmen's compensation insurance from the Industrial Commission[58] the Ohio employee does not have alternative remedies.[59]

He does, however, have additional remedies. An employee who receives an injury at work which is covered by the Workmen's Compensation Act and is paid compensation by reason of such injury is still permitted to attempt recovery from a third party which negligently caused his injury.[60] Such an action is permitted even though at the time of the injury both the third party and the injured party's employer had complied with the Workmen's Compensation Act.[61]

After some vascillation the Ohio Supreme Court has held that in the third party action the amount of workmen's compensation received by the injured party is not to be deducted from the judgment recovered against the third party.[62]

However, an employee who is injured at work due to the negligence of a fellow employee generally is not entitled to recover from the fellow employee. The Ohio Supreme Court first considered this problem in *Landrum v. Middaugh*,[63] where the plaintiff was injured due to the negligence of his foreman in starting certain machinery at a time while plaintiff was in a position of peril. Plaintiff was paid compensation by the Industrial Commission for his injuries and then filed a civil action against the foreman. In entering judgment for the foreman the court said that his acts were the acts of his employer and that he therefore could not be held liable for those acts. The court noted that the foreman had performed the negligent acts under the complete control and direction of his employer, and that the foreman had not acted maliciously, wantonly or with wilfull intent.

In the case of *Morrow v. Hume*,[64] recovery was permitted in a

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[58] OHIO REV. CODE § 4123.77 (1953).

[59] OHIO REV. CODE § 4123.74 (1953) provides: "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, disease, or bodily condition, *whether or not such injury, disease, or bodily condition is compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code,* or for any death resulting from such injury, disease, or bodily condition of any employee, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured employees or the dependents of his killed employees." (Emphasis added.)

[60] Truscon Steel Co. v. Trumbull Cliffs Furnace Co., 120 Ohio St. 394, 166 N.E. 368 (1929); Ohio Pub. Serv. Co. v. Sharkey, 117 Ohio St. 586, 160 N.E. 687 (1928); Trumbull Cliffs Furnace Co. v. Shachovsky, 111 Ohio St. 791, 146 N.E. 306 (1924).

[61] See note 60, *supra.*

[62] Truscon Steel Co. v. Trumbull Cliffs Furnace Co., *supra* note 58, reversing a contrary decision in Ohio Pub. Serv. Co. v. Sharkey, *supra* note 58.

[63] 117 Ohio St. 608, 160 N.E. 691 (1927).

[64] 131 Ohio St. 319, 3 N.E.2d 39 (1936).

wrongful death action against the decedent's fellow employee. Both the decedent and the defendant were employed by the same company. The defendant was a vice president in charge of sales and the decedent was a salesman working under defendant's direction and control. Plaintiff's decedent was killed when the automobile owned and driven by defendant was wrecked due to defendant's negligence. At the time of the accident the parties were enroute from Youngstown to Detroit to meet a prospective purchaser of products of their employer.

The Ohio Supreme Court held that plaintiff could recover from her decedent's fellow employee because there were no facts alleged to show that the employer had any power or right to direct the operation and control of the automobile. It distinguished the *Landrum* case on the ground that there the negligent employee was the *alter ego* of the employer whereas in the case at bar the defendant was in a different position in that he was operating and controlling his own automobile.[65]

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[65] The law on the right of an injured employee who has collected Workmen's Compensation benefits to sue his negligent fellow employee has been left in confusion by the recent supreme court decision in Ellis v. Garwood, 168 Ohio St. 241, 152 N.E.2d 100 (1958). Upon appeal of a ruling on the pleadings the court held that the New York statute specifically prohibiting such an action did not govern an injury which occurred in Ohio although both parties were residents of New York and were working for a New York employer. In this opinion the court seems to indicate that it is overruling the Landrum v. Middaugh case, *supra* note 63. In fact, in a concurring opinion in the *Ellis* case, Judge Taft expressed the view that the Morrow v. Hume case had overruled the *Landrum* case and that the majority in this opinion should have specifically stated that Landrum v. Middaugh was overruled. The facts in the case so far as revealed appear to be similar to those in Morrow v. Hume, *supra* note 64.

The court recognized that further consideration would eventually have to be given by it to this area of the law, saying: "It may well be that a more complete treatment of the subjects of suits by co-employees who have received compensation from the State Insurance Fund is merited. It is apparent, however, that such treatment must be left to a review by this court of a decision wherein there is a more complete record than that in the instant case which has not passed the pleading stage." 168 Ohio St. at 247, 152 N.E.2d at 104.

It must, for the present at least, be assumed that the receipt of or eligibility for workmen's compensation benefits is not a defense available to a negligent fellow employee, officer or agent of the complying employer. See Gee v. Horvath, Supreme Court No. 35526, Gongwer Sup. Ct. Rep., March 6, 1958, where the Court of Appeals for Lucas county refused to allow such a defense to a fellow employee in an action for a lunch time injury. The motion to certify was dismissed by the supreme court on motion filed by the appellee. XXXI Ohio Bar No. 16, April 21, 1958, at 335. However, the *Gee* case has been returned to the supreme court by the Lucas County Appellate Court which certified that its decision was in conflict with another appellate decision. Supreme Court No. 35725, Gongwer Sup. Ct. Rep., August 2, 1958. Thus, in the early future, we can expect further consideration by the supreme court of this area of the law.

Will not employees demand that their employers indemnify them against such liability thus in effect resulting in liability to the employer for both workmen's compensation benefits and common law damages? And if such indemnity cannot

The injured employee may under certain circumstances be entitled to collect from his employer a penalty award. The Ohio Constitution[66] provides that where an employee's injury, disease or death is due to the failure of his employer to comply with a specific requirement for the protection of the lives, health or safety of employees, such employee is entitled to receive additional compensation.[67] The additional compensation may not be less than fifteen per cent nor more than fifty per cent of the maximum award established by law.[68]

The Industrial Commission from time to time adopts safety codes[69] which contain many specific safety requirements. On adoption these codes become orders of the Industrial Commission.

It has been repeatedly held by the Ohio Supreme Court that a statute enacted by the General Assembly or an order promulgated by the Industrial Commission which prescribes merely a general course of conduct is not a "specific requirement" within the meaning of the constitutional provision.[70] It is necessary that the "specific requirement" be of a character which plainly appraises an employer of his legal obligations towards his employees and it is not sufficient unless the requirement demands that some particular and definite act or thing be done.[71] To be sufficient the specific requirement must prescribe such specific safety re-

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be secured, will not employees, who witness an accident, now refuse to give evidence needed by the injured employee to establish his compensation claim, fearing that their knowledge may result in a lawsuit against them, especially if they were engaged in any way in the work which caused the accident? And will not employees be threatened with the loss of their life savings unless they obtain insurance coverage against such personal liability? Indeed, may not some employers look to a negligent employee for a contribution to a settlement of a compensation claim giving in return a release from the injured employee which would name not only the employer but the negligent employee as well?

The court's pronouncement in the *Ellis* case, *supra,* which admittedly goes beyond the issue submitted and which the court says was made when more complete treatment of suits by co-employees was merited, may very well mean the destruction of the Workmen's Compensation Act itself. It may also have planted the seed which will destroy the harmony which usually exists between union members, for with one suing the other strong opinions are sure to be formed and violent reactions to be expected. Perhaps unions should now offer insurance policies for their members under a group plan to cover such contingencies.

[66] OHIO CONST. art. II, § 35.

[67] Prior to the constitutional amendment in 1923 the words "lawful requirement" were used in place of the words "specific requirement."

[68] See note 63, *supra.*

[69] *E.g.,* State of Ohio, *Specific Requirements and General Safety Standards of the Industrial Commission of Ohio For Workshops and Factories,* Bull. No. 203. (eff. January 1, 1951).

[70] State *ex rel.* Holdosh v. Industrial Comm'n, 149 Ohio St. 179, 78 N.E.2d 165 (1948); State *ex rel.* Davidson v. Industrial Comm'n, 145 Ohio St. 102, 60 N.E.2d 664 (1945); State *ex rel.* Rae v. Industrial Comm'n, 136 Ohio St. 168, 24 N.E.2d 594 (1939); State *ex rel.* Stuber v. Industrial Comm'n, 127 Ohio St. 325, 188 N.E. 526 (1933).

[71] State *ex rel.* Holdosh v. Industrial Comm'n, *supra* note 70.

quirements as will forewarn the employer and establish a standard which he may follow.[72] A claimant in applying for additional compensation by reason of his employer having violated a specific requirement can not rely upon a specific safety requirement which is directed towards some industry other than that in which his employer was engaged at the time of the injury.[73]

As noted above, the Ohio Constitution provides that an employee whose injury is caused by violation of a specific requirement is entitled to additional compensation which may not be less than fifteen per cent nor more than fifty per cent of the "maximum award established by law."[74] In *State ex rel. Engel v. Industrial Comm'n*[75] this statutory language was interpreted. Although sufficient facts were not presented to the court to enable it to specifically apply the language to the case presented, the court's decision makes it clear that the language is to be given its full intent. For example, if an employee whose average weekly wage for the year prior to the injury amounted to $45.00 were totally disabled for one hundred weeks, he would receive $3,000 in compensation (100 x 2/3 of his $45.00 average weekly wage or $30.00). The statutory maximum weekly compensation is $40.25,[76] but to receive the maximum the employee's average weekly wage must amount to $60.38 or more. If the employee were awarded an additional fifty per cent for violation by his employer of a specific safety requirement, he would receive one hundred weeks at $20.12½, this being fifty per cent of $40.25, the maximum award established by law. His award for the violation then would be $2012.50 which is $512.50 more than fifty per cent of the compensation he would receive for his total disability.

Any penalty award is to be paid by the employer directly even though he is insured by the State Fund. If it is paid by the State Fund, the particular employer's premium is increased in an amount equal to the award.[77] In other words, it is not possible to insure this liability.

At one time an employee who was disabled because of his employment but was not entitled to workmen's compensation benefits since his disability was not covered by the act could bring a personal injury action against his employer.[78] The act was amended in 1939 to prohibit such action.[79] This amendment has been applied to prohibit recovery by a

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[72] State *ex rel.* Rae v. Industrial Comm'n, *supra* note 70.

[73] State *ex rel.* Miller Plumbing Co. v. Industrial Comm'n, 149 Ohio St. 493, 79 N.E.2d 553 (1948).

[74] OHIO CONST. art. II, § 35.

[75] 142 Ohio St. 425, 52 N.E.2d 743 (1944).

[76] OHIO REV. CODE § 4123.57 (Baldwin Supp. 1958).

[77] See note 74, *supra.*

[78] Weil v. Taxicabs of Cincinnati, 139 Ohio St. 198, 39 N.E.2d 148 (1942); Triff v. National Bronze & Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E.2d 232 (1939).

[79] The prohibition is now contained in OHIO REV. CODE § 4123.74 (1953). See note 59, *supra.*

wife of an injured employee in an action against an employer[80] and to prohibit recovery by a husband in an action against the employer where his wife received a compensable injury.[81]

A personal injury action cannot be maintained by the employee against his employer even if the employer fails to report an injury thereby causing the employee to have his rights under the Workmen's Compensation Act barred by the statute of limitations. In *Greenwalt v. Goodyear Tire & Rubber Co.*,[82] the court held that a demurrer to plaintiff's petition had been properly sustained although the petition alleged that the defendant employer gratuitously offered to file a claim with the Industrial Commission for its employee, the plaintiff, and failed to do so within the time required by the statute of limitations. The petition characterized the failure as "wilfull and fraudulent" and charged that it was for the specific purpose of defeating plaintiff's claim.

Interaction Between Court and Legislature

History of 1937 Amendment from Malone to Dripps

Prior to 1937 such definition of injury, as existed, appeared in General Code section 1465-68[83] and read: "Every employee . . . who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted . . . shall be paid compensation. . . ."[84]

In 1937 the act was amended adding the following paragraph to General Code section 1465-68: "The term 'injury' as used in this section and in the Workmen's Compensation Act shall include any injury received in the course of and arising out of the injured employee's employment."[85]

There is nothing in the added language to indicate that a revolutionary change was intended by the legislature. Many, however, have assumed that the language added by the 1937 amendment read: "The term 'injury' shall include any injury"; or that the language read: "The term 'injury' shall include any injury whether caused by accidental means or where only accidental in result." In other words, many have assumed that the legislature intended to broaden the definition of the word "injury."

A careful analysis will show that the 1937 amendment, in fact,

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80 156 Ohio St. 295, 102 N.E.2d 444 (1951).

81 Calhoon v. Youngstown Pressed Steel Co., No. 901, App. Ct. Trumbull county, Ohio, 1936; Grinstead v. A. & P., No. 29589, C.P. Ct. Lake county, Ohio, 1956.

82 164 Ohio St. 1, 128 N.E.2d 116 (1955).

83 103 Ohio Laws 72, 79; 111 Ohio Laws 218, 220.

84 This provision is now contained in Ohio Rev. Code § 4123.54 (1953).

85 117 Ohio Laws 109. Since the revision of the Code, this definition has appeared in Ohio Rev. Code § 4123.01(C) (1953).

added a new requirement. Before the amendment the phrase "and arising out of" did not appear in the act, although the phrase "in the course of" did. However, the courts in defining "injury" had since the inception of the act used both phrases joined by the conjunction "and."[86] It is submitted therefore that the legislature by its 1937 amendment was codifying, confirming or ratifying the definition of "injury" which had appeared in the cases since the inception of the workmen's compensation law.

Those who thought the 1937 amendment constituted a revolutionary change in the law were encouraged by the Supreme Court's decision in 1942 in *Malone v. Industrial Comm'n.*[87] Plaintiff's son, a foundry worker, collapsed at work and died the same day as a result of heat exhaustion brought about because he was exposed to temperatures of 113 degrees when the outside temperature was 90 degrees. It was maintained by the Industrial Commission that the decedent had voluntarily subjected himself to the heat of the place where he was working and that he was performing his normal work. In its opinion the supreme court said:

> To restate the rule under the present statute, the term "injury" as used in the Workmen's Compensation Act, comprehends a physical or traumatic damage or harm, accidental in its origin and character in the sense of being the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place.[88]

Notwithstanding this pronouncement the court made it clear that the claim was compensable when considered in the light of its prior decisions, saying: "The fact is that scores of compensable accidental injuries result where no accidental circumstance precedes or causes them. Many such injuries have been recognized as compensable by this court."[89] However, in its opinion the court also stated: "This court is still committed to the proposition that a compensable injury under the Workmen's Compensation Act must be accidental and traumatic in character."[90]

It is submitted therefore that the *Malone* case, although containing

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[86] See Industrial Comm'n v. Lewis, 125 Ohio St. 296, 181 N.E. 136 (1932); Fassig v. State *ex rel.* Turner, 95 Ohio St. 232, 116 N.E. 104 (1917).

[87] 140 Ohio St. 292, 43 N.E.2d 266 (1942).

[88] *Id.* at 300, 43 N.E.2d at 270-71.

[89] *Id.* at 298, 43 N.E.2d at 270. The court cited as examples: Kaiser v. Industrial Comm'n, 136 Ohio St. 440, 26 N.E.2d 449 (1940); Industrial Comm'n v. Bartholome, 128 Ohio St. 13, 190 N.E. 193 (1934); Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N.E. 870 (1934); Industrial Comm'n v. Palmer, 126 Ohio St. 251, 185 N.E. 66 (1933); Industrial Comm'n v. Weimer, 124 Ohio St. 50, 176 N.E. 886 (1931); Industrial Comm'n v. Polcen, 121 Ohio St. 377, 169 N.E. 305 (1929); Industrial Comm'n v. Roth, 98 Ohio St. 34, 120 N.E. 172 (1918).

[90] *Id.* at 300, 43 N.E.2d at 271.

a discussion of the amendment of 1937, was at most a reassertion that when an employee is subjected to a greater hazard than are members of the general public by reason of the activities, conditions, and requirements of his employment and such hazard results in disability to the employee, then he will be considered to have been accidentally injured. Excessive heat then, even though not unusual in the particular employee's occupation, was added to other previously recognized hazards such as contact from deleterious gases, destructive temperatures or forces of nature. In other words, the *Malone* case demonstrates that the coverage of the act was not decreased by the 1937 amendment.

The decisions since the amendment of 1937, both those prior and subsequent to the *Malone* case, clearly indicate that the court in the *Malone* case did not overnight adopt a new concept of injury. Had the court intended otherwise, it would have had to specifically overrule *Matczak v. Goodyear Tire & Rubber Co.*,[91] *Industrial Comm'n v. Franken*,[92] and other similar decisions.

Only in this way can the *Malone* case be reconciled not only with the *Dripps* case[93] but also with the *Artis* case.[94] If these three cases cannot be so reconciled then the following comment of Judge Taft made in his concurring opinion of the *Dripps* case must stand:

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[91] 139 Ohio St. 181, 338 N.E.2d 1021 (1942). See discussion pp. 556-58, *supra.*

[92] 126 Ohio St. 299, 185 N.E. 199 (1933).

[93] 165 Ohio St. 407, 135 N.E.2d 873 (1956). See discussion pp. 555-57, *supra.*

[94] 165 Ohio St. 412, 135 N.E.2d 877 (1956). See discussion pp. 556-57, *supra.* This is substantially the position taken by the Tuscarawas Court of Appeals in Picchetti v. Pittsburgh Plate Glass Co., 105 Ohio App. 514, 518 (1957), where the court said:

"This instruction goes to the vital question in this case as to whether the inhalation of poisonous gas constitutes an accidental injury. No citation of authority is needed to support the proposition that if the instruction was proper a refusal to give it was prejudicial error no matter what the court said in its general charge. The argument around the instruction concerns whether the case of Dripps v. Industrial Commission, 165 Ohio St., 407, 135 N.E. (2d), 873, overrules the case of Malone v. Industrial Commission, 140 Ohio St., 292, 43 N.E. (2d), 266. While Judge Taft in his concurring opinion in the *Dripps* case thinks it does, the court does not so hold, and it is inconceivable to this writer that they would not have done so, in view of Judge Taft's opinion which was available to the court before the syllabus was written, if they had concurred therein. Consequently, as we view it, the *Malone* case is still the law of Ohio.

"In the case of Sebek v. Cleveland Graphite Bronze Co., 148 Ohio St., 693, at page 696, 76 N.E. (2d), 892, it is stated:

'This court has held in a number of cases that bodily harm, which occurs to a workman by the sudden, unexpected and unforeseen inhalation of noxious or poisonous gases or fumes, or by contact with a poisonous substance, constitutes a compensable injury within the meaning of the provisions of the Workmen's Compensation Act of Ohio. In such a situation, compensation is awarded on the basis of the injury and not for the disability or disease which may be attributable thereto. Industrial Commission v. Roth, 98 Ohio St., 34, 120 N.E., 172, 6 A.L.R., 1463: Industrial Commission v. Burckard, 112 Ohio St., 372, 147 N.E., 81; Industrial Commission v. Palmer, 126 Ohio St., 251, 185 N.E., 66; Industrial Commission v.

> As I view it, to the extent that they are inconsistent therewith *Malone v. Industrial Commission* . . . and *Maynard v. B. F. Goodrich Co.* . . . are being overruled by the decision and paragraph one of the syllabus of the instant case. I believe therefore that some such statement should be made in paragraph one of the syllabus herein to avoid confusing those courts which are required to follow and those lawyers who rely upon the decisions and pronouncements of law made by this court.[95]

In any event, the pronouncement of the court in the *Dripps* case has terminated further debate as to the meaning of the 1937 amendment and has provided a clear explanation of what constitutes a compensable injury.

Inclination of the Supreme Court as Compared With the Lower Courts and the Commission

The supreme court has said that the provisions of the workmen's compensation law are to be construed liberally in favor of the injured workmen seeking benefits thereunder.[96] The writer submits that while the court has construed the act liberally, its decisions and opinions have shown a consistency from the beginning of the act. Compare the numerous times it has used language which was used in its prior decisions and has cited its prior cases.

Lawsuits oftentimes are commenced because of differences between the parties over the interpretation of the facts and because of differences over the application of the law and the facts. For this same reason it is only to be expected that a great variety of decisions will be found among the trial courts and various courts of appeal. Almost without exception, however, this is not due to the failure of the lower courts to follow the law as pronounced by the supreme court but due to the manner in which the law is applied to the facts under consideration or in the manner the facts are interpreted to bring them under the law.

That the lower courts consistently follow the supreme court's interpretations of the workmen's compensation law is demonstrated by the number of times they have followed the *Dripps* case.[97] Since that decision in July 1956 there have been at least four reported lower court

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Helriggle, 126 Ohio St., 645, 186 N.E., 711; Industrial Commission v. Bartholome, 128 Ohio St., 13 190 N.E., 193; 42 Ohio Jurisprudence, 649, Section 64.'

"We likewise think that this pronouncement is still the law of Ohio."

[95] See note 93, *supra* at 410-11, 135 N.E.2d at 876.

[96] State *ex rel.* Jackson v. Industrial Comm'n, 167 Ohio St. 290, 147 N.E.2d 666 (1958); Bowling v. Industrial Comm'n, 145 Ohio St. 23, 60 N.E.2d 479 (1945); Industrial Comm'n v. Weigandt, 102 Ohio St. 1, 130 N.E. 38 (1921); Industrial Comm'n v. Pora, 100 Ohio St. 218, 125 N.E. 662 (1919). See also Davidson v. Industrial Comm'n, 52 Ohio L. Abs. 194, 82 N.E.2d 866 (1947); 42 Ohio Jur. *Workmen's Compensation* § 5, at 578-79.

[97] See note 93, *supra.*

decisions considering the *Dripps* decision.[98] In each of these decisions the lower court has held that claimant did not receive a compensable injury since it was not an accidental injury.

In the earliest of these cases there was testimony that plaintiff's decedent while performing his usual work as an elevator operator was seen leaving his elevator in a falling position.[99] Death resulted from the fall. The appellate court said that the sole question before it was whether decedent has suffered an accidental injury. After considering the *Dripps* case it reversed the judgment which had been entered for plaintiff and entered judgment for the Industrial Commission.

More recently the Hamilton County Court of Appeals considered a case where the testimony indicated that decedent, while stooping to lift a pail of oil and water weighing twenty to thirty pounds, became disabled.[100] Medical testimony offered at the trial indicated that a week after the incident the employee died from a subarachnoid hemorrhage caused by the disability. After discussing the *Dripps* case the court concluded that it could find no distinction between the material facts in that case and the case at bar; therefore, it reversed the judgment which had been recovered by plaintiff and entered judgment for the Industrial Commission. In doing so the court recognized that its holding was contrary to one of its own decisions[101] which had been decided prior to the *Dripps* case.

Also, after the *Dripps* decision the Franklin County Appellate Court had before it a workmen's compensation case where plaintiff suffered a subarachnoid hemorrhage while parking a Cadillac automobile in a small stall in a garage where he was employed.[102] The evidence offered at the trial indicated that the car had steered hard, that in order to back it into the stall claimant had been required to keep his foot on the brake on the left side, to lean over to the right side of the automobile as far as possible and to twist his body and head to the rear in order to see the clearance in the parking space, thus requiring greater effort than usual. While so working claimant was stricken. In entering a judgment for the Industrial Commission the court stated that in the case at bar, just as in the *Dripps* case, there was no evidence of an accidental injury by external means resulting from some specific event or mishap. This same court recently entered another judgment for the Industrial Commission in a

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98 Cartwright v. General Motors Corp., 78 Ohio L. Abs. 449 (Franklin county App. 1958); Long v. Industrial Comm'n, 149 N.E.2d 922 (Hamilton county App. 1957); White v. Industrial Comm'n, 4 Ohio Op. 2d 395, 149 N.E.2d 40 (1957); Miller v. Industrial Comm'n, 76 Ohio L. Abs. 100, 145 N.E.2d 490 (1956).

99 Miller v. Industrial Comm'n, *supra* note 98.

100 Long v. Industrial Comm'n, *supra* note 98.

101 Williams v. Industrial Comm'n, 95 Ohio App. 275, 119 N.E.2d 126 (1953).

102 White v. Industrial Comm'n, *supra* note 98.

case[103] where the employee felt a sudden pain in his back while in a stooped position carrying a pot of paint.[104]

The writer in his personal experience has found that Deputy Administrators, regional boards, and the Industrial Commission, are as conscientious as the lower courts in applying the law as pronounced by the supreme court. Fortunately, it is only on rare occasions that one encounters a hearing officer who recognizes the law, but refuses to follow it. The complaint, if there be any, is usually one of misapplication.

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[103] Cartwright v. General Motors Corp., *supra* note 98.

[104] After the *Dripps* decision the Mahoning County Court of Appeals held in the unreported case of Davis v. Goodyear Tire & Rubber Co. that an employee had received a compensable back injury since his disability occurred when he was required to exert greater pressure than usual to remove a tire from the collapsable drum upon which the tire was being built. The court in a split decision distinguished the *Dripps* case on the ground that the "unusual event" which is required by the *Dripps* case was the failure of the drum to break down thereby causing the tire to stick. Gongwer State Rep. 10980. On April 23, 1958 the Ohio Supreme Court allowed a motion to certify this case. XXXI Ohio Bar No. 17, at 363. Its decision will not be rendered before this article is published.